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No. 89-501

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NORTHWESTERN INDIANA TELEPHONE CO., INC.,
and NORTHWEST INDIANA CATV, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION

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QUESTIONS PRESENTED

1. Whether this Court should decide whether the Federal Communications Commission's rule restricting telephone company affiliations with cable companies is facially unconstitutional under the First Amendment because it allegedly goes beyond the terms of the Cable Communications Policy Act of 1984.

2. Whether the court of appeals, on petitioners' second appeal after a limited remand, correctly declined to hear petitioners' statutory and constitutional challenges to the FCC's rule because petitioners failed to raise those challenges before the FCC prior to their first appeal.

3. Whether, under 47 U.S.C. § 214(a), a telephone company must obtain prior certification from the FCC in order to construct, for an affiliated cable company, facilities for transmission of interstate broadcast signals.

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OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-13a) is reported at 872 F.2d 465. The opinion of the court of appeals remanding the case to the Federal Communications Commission (Pet. App. 32a-43a) is reported at 824 F.2d 1205. The opinion of the Commission on remand (Pet. App. 18a-31a) is reported at 3 FCC Rcd 3096. The initial opinion of the Commission (Pet. App. 103a-127a) and the opinion denying recon-

sideration (Pet. App. 78a-102a) are reported, respectively, at 103 F.C.C.2d 600 and 104 F.C.C.2d 451.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1989. A petition for rehearing was denied on June 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350.

STATEMENT

1. This case involves a challenge to an enforcement proceeding by the Federal Communications Commission (FCC or Commission) against petitioners—Northwestern Indiana Telephone Co. (NITCO), a local telephone company, and Northwest Indiana CATV, Inc. (Northwest), a cable television company—for what the Commission found to be "repeated," "willful," "egregious," "flagrant" violations of two longstanding federal requirements. Pet. App. 68a, 95a, 97a. Both requirements restrict the involvement of telephone companies in the provision of cable television service, and both date back to the earliest days of FCC regulation of cable television.

First, in 1968, the Commission ruled that, under Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), a telephone company must obtain Commission certification before constructing, acquiring, or operating cable television distribution facilities or providing channel service to a cable system. *General Telephone Co. of California*, 13 F.C.C.2d 448, *recon. denied*, 14 F.C.C.2d 695 (1968), *aff'd sub nom. General Tel. Co. of California v. FCC*, 413 F.2d 390, 395-401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). *See* Pet. App. 4a, 7a n.2 (noting that this requirement was "established long ago"). Second, in 1970, the Commission promulgated restrictions on cross-ownership between local telephone companies and cable television companies in a single community, seeking to prevent local telephone monopolies

from cross-subsidizing affiliated cable businesses and from discriminatorily denying necessary access to pole and conduit space. *See Section 214 Certificates*, 21 F.C.C.2d 307, *recon. granted in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Tel. Co. of the Southwest v. FCC*, 449 F.2d 846 (5th Cir. 1971). The restrictions forbid a telephone company to provide cable television service either directly or through an "affiliate" owned, operated, or controlled by (or under common control with) the telephone company. They also forbid a telephone company to provide channels of communication or pole or conduit space to such an affiliate. And they define "affiliate" and "control" to cover "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly" except the "carrier-user" relationship. 47 C.F.R. § 63.54 & Note 1(a).[1]

Notwithstanding those requirements, the telephone company (NITCO), which is owned by Robert Mussman, and the cable company (Northwest), which is owned by Rhys Mussman (Robert's son), undertook various arrangements with one another, without seeking Commission approval. Thus, Rhys Mussman resigned his position as NITCO's highest salaried employee at the end of 1982, but under an unwritten contract he continued to work for NITCO as a consultant, with approximately the same salary and with other benefits, at the same time that he worked at his cable operation. Pet. App. 110a-11a. Rhys arranged with NITCO to rent office space for Northwest adjacent to the telephone company, to lease space for cable facilities on NITCO property,

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[1] The cross-ownership rule was only regulatory until 1984. In that year, Congress enacted the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, which added a statutory cross-ownership bar, 47 U.S.C. § 533(b). In a rulemaking proceeding after enactment of the Cable Act, the Commission concluded that its regulation was consistent with the Act and left it intact. 50 Fed. Reg. 18637, 18644 (1985).

and to receive mail at NITCO's post office box. *Id.* at 110a, 112a. The Mussmans made agreements, which were oral until this litigation commenced, for NITCO to construct cable systems for Northwest in three communities. *Id.* at 108a-09a. Robert and his wife guaranteed loans to Rhys's cable company and signed an indemnity agreement with one community that awarded a cable franchise to Rhys. *Id.* at 111a. And, in seeking franchises for his cable operation, Rhys repeatedly pointed out his family and business connections to NITCO. *Id.* at 113a. In addition, NITCO leased pole space to Northwest. *Id.* at 109a. NITCO did not seek advance approval from the Commission before constructing facilities for or providing pole space to Northwest. *Id.* at 120a-21a.

Based on those essentially undisputed facts, in a proceeding initiated in 1983 by an independent cable operator competing with Northwest, the Commission concluded in March 1985 that petitioners had violated both the cross-ownership rule and 47 U.S.C. § 214(a). Pet. App. 103a-27a. The Commission subsequently denied reconsideration. *Id.* at 78a-102a.[2] In those proceedings, petitioners did not argue that the cross-ownership rule was inconsistent with the 1984 Cable Act or that the rule was invalid under the First Amendment either facially or as applied.

2. On petition for review, the court of appeals remanded the case to the FCC for clarification of two matters. Pet. App. 32a-43a. First, the court concluded

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[2] The Commission noted that petitioners had been specifically advised to look into cross-ownership problems as early as April 1982, and had been expressly warned by the Commission in April 1984 that they risked sanctions if they continued their cable activities. Pet. App. 95a-96a, 115a-16a. Petitioners nevertheless continued their affiliation and construction of cable facilities and did not seek Commission approval. The Commission stated that "[t]he nature, extent and gravity of the violations [in this case] . . . are unprecedented." *Id.* at 98a.

that the Commission had been unclear about whether it had relied on NITCO's provision of pole space to Northwest, standing alone, as evidence that NITCO and Northwest were affiliated within the meaning of the cross-ownership rule. *Id.* at 38a-39a. Second, the court concluded that the Commission had not adequately explained why NITCO's construction of cable facilities for Northwest did not come within the "carrier-user" exception to the cross-ownership rule, when the FCC had applied that exception in two other recent cases involving telephone company construction of facilities for a cable company. *Id.* at 39a-42a & n.6 (discussing *The Chesapeake and Potomac Co. ("C & P")*, 57 Rad. Reg. 2d 1003 (1985), and *Ohio Bell Tel. Co. ("Ohio Bell")*, 1 FCC Rcd 942 (1986)). The court directed the FCC to clarify its ruling in both respects.[3]

The court also noted that petitioners now had argued that the cross-ownership rule was inconsistent with the 1984 Cable Act and violated the First Amendment on its face and as applied. Petitioners made their statutory argument for the first time in their opening brief on appeal; they did not make their constitutional arguments until a supplemental brief submitted on March 12, 1987, one week before oral argument. Relying on 47 U.S.C. § 405, the court decided that it was precluded from entertaining those arguments because petitioners had failed to present them to the Commission. *See* Pet. App. 42a n.8. With respect to petitioners' argument that the Cable Act applied to this case, the court added that petitioners had previously contended that the Act did *not*

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[3] With respect to petitioners' argument that Section 214(a)'s requirement of FCC certification did not apply to them, the court observed that "all parties agree that a certificate would be required if NITCO and Northwest[] are properly determined to be affiliated." Pet. App. 42a-43a. Because the FCC might validly find affiliation on remand, the court of appeals reserved judgment on the question whether Section 214(a) would apply in the absence of affiliation. Pet. App. 42a-43a.

apply here because it was enacted after the 1982-1983 conduct at issue. *Ibid.*

3. On remand, the Commission explained that it had not intended to rely on NITCO's provision of pole space to Northwest as evidence of affiliation, but only to conclude that the provision of pole space violated the cross-ownership rule because other evidence demonstrated NITCO's affiliation with Northwest. Pet. App. 22a-23a.[4] The Commission also clarified why the carrier-user exception applied in *C & P* and *Ohio Bell* but not in this case. That exception, the Commission explained, applies only when the carrier holds itself out as a common carrier to provide the same service to all cable television entrepreneurs indiscriminately. The telephone companies in *C & P* and *Ohio Bell* did so; NITCO did not. Pet. App. 25a-28a.[5]

4. On petitioners' second appeal, the court of appeals affirmed. Pet. App. 1a-13a.[6] The court initially concluded

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[4] The Commission cited additional evidence of affiliation to supplement the previously cited evidence: Rhys Mussman was serving as Executive Vice President of NITCO while running his cable company as an individual proprietorship; Rhys Mussman, while Executive Vice President of NITCO, negotiated pole attachment agreements for NITCO with cable companies competing against his own cable company; all of the contractual arrangements between petitioners were oral; the consulting arrangement between NITCO and Rhys Mussman was oral; and Rhys Mussman told city franchising officials that he was the Executive Vice President of NITCO and that his father, Robert Mussman, was Secretary-Treasurer of Northwest. Pet. App. 24a.

[5] The Commission declined to address petitioners' statutory and constitutional challenges to the cross-ownership rule, explaining that these "new" arguments were outside the scope of the remand order and, in any event, that it would not be in the public interest to consider the arguments "at this late date." Pet. App. 31a n.40.

[6] The National Cable Television Association intervened at that stage of the case and is a respondent in this Court pursuant to Rule 19.6 of the Rules of this Court.

that the Commission had adequately explained its reliance on NITCO's provision of pole space to Northwest and its distinction of the present case from *C & P* and *Ohio Bell*. Pet. App. 6a-9a. The court then rejected petitioners' attempt to raise their statutory and constitutional challenges to the cross-ownership rule, noting that petitioners had not raised them "in the initial proceedings before the Commission and this court." *Id.* at 9a.

First, the court held that "where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." Pet. App. 9a (citing *Laffey v. Northwest Airlines*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985)). Otherwise, as the *Laffey* court had explained (following Judge Friendly's observation in *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982)), a party who did not properly present an argument on a first appeal would be better off than one who did present the argument and lost. Pet. App. 9a-10a. Noting also that "[t]his widely-accepted rule furthers the important value of procedural efficiency" (*id.* at 9a), the court ruled that all of petitioners' new arguments were barred because they had not been properly raised on the first appeal.

Second, the court held that petitioners' statutory and as-applied constitutional challenges were barred directly by the exhaustion principle codified in 47 U.S.C. § 405, requiring compliance with agency procedural requirements. Pet. App. 10a-12a.[7] Petitioners had violated those requirements by failing to raise their challenges in the initial proceedings before the FCC, and the Commission

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[7] The court of appeals did not apply its exhaustion analysis—or the law-of-the-case analysis discussed in the following paragraph—to petitioners' facial constitutional challenge to the Commission's rule. As we discuss at note 12, *infra*, however, we believe that the court's analysis on both points would apply to that issue as well.

properly decided that the public interest would not be served by allowing petitioners to raise their already-forfeited arguments based on "the fortuity of [the] remand." Pet. App. 11a. Noting that petitioners had no excuse for their delay in raising these arguments, the court explained: "The efficiency and fairness values served by exhaustion principles would be seriously compromised if agencies were obliged to furnish such second bites at the apple." *Ibid.* (footnote omitted).

Finally, the court held that law-of-the-case principles supported its refusal to entertain petitioners' statutory and as-applied constitutional arguments. Pet. App. 12a-13a. The court pointed out that it had already decided, on petitioners' first appeal, that those arguments had been barred by petitioners' failure to comply with Section 405's exhaustion requirement. Pet. App. 12a (citing *id.* at 42a n.8). The court also recalled that it had observed, with respect to the statutory argument, that petitioners had "actually argued before the Commission that the Cable Act did *not* apply to their case." Pet. App. 12a (emphasis added). Concluding for those reasons that it should not revisit the first panel's rejection of petitioners' arguments, the court expressly declined to decide whether the cross-ownership rule's definition of "affiliate" and "control" is at odds with the 1984 Cable Act or whether the Cable Act applied to this enforcement action, which was commenced in 1983 and concerned conduct pre-dating the Act. Pet. App. 13a n.5.[8]

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[8] Although Rhys Mussman has since sold the cable system (Pet. 13), it appears that the case is not moot because of potential collateral consequences of the FCC decision under review. *See id.* at 22 n.33.

ARGUMENT

Petitioners' challenges to the court of appeals' decision are wholly meritless. The decision announces no novel or broad proposition of law, but applies well-established principles vital to the orderly conduct of appellate review of agency action. The court's rejection of petitioners' contentions is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

I. THERE IS NO RULING ON THE MERITS OF PETITIONERS' CABLE ACT AND FIRST AMENDMENT CLAIMS FOR THE COURT TO REVIEW IN THIS CASE.

Petitioners first ask this Court to grant review to decide that the Commission's cross-ownership rule is both unauthorized and unconstitutional on its face because the rule's definition of "affiliate" and "control," petitioners contend, is more restrictive than the Cable Act allows. Pet. 17-20. This argument presents no basis for this Court's review. The court of appeals did not render any decision on the merits of either a Cable Act or First Amendment argument. Indeed, the court twice expressly declined to rule on petitioners' statutory and First Amendment challenges. Pet. App. 9a-13a & n.5, 42a n.8. Accordingly, there is no lower court ruling on the issue of the constitutional and statutory validity of the cross-ownership rule's definition of "affiliate" and "control" for the Court to review in this case.[9]

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[9] Although not necessary to the disposition of this petition, we note a few points on the merits of the Cable Act and First Amendment arguments. To begin with, the rule is entirely in accord with the Cable Act's cross-ownership provision, 47 U.S.C. § 533(b). The legislative history specifically says that Section 533(b) was intended "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers" (with an exception not relevant here), H.R. Rep. 98-934, 98th Cong., 2d Sess. 56 (1984), and there is no basis for concluding that Congress

II. THE COURT OF APPEALS CORRECTLY DECLINED TO CONSIDER PETITIONERS' CABLE ACT AND FIRST AMENDMENT CLAIMS ON THEIR SECOND APPEAL.

Petitioners next contend that the court of appeals erred in declining to allow them to press their Cable Act and First Amendment arguments. Pet. 20-28. None of petitioners' arguments in support of that contention has merit.

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nonetheless intended to transform prohibited relationships into protected ones, without saying a word to that effect. Moreover, there is, at a minimum, a serious question whether the Cable Act, even if it were somehow inconsistent with the cross-ownership rule, would disable the Commission from completing an enforcement proceeding that was commenced before the Act took effect and that sought to impose sanctions for repeated, deliberate, and flagrant violations of pre-Act rules, including the Section 214(a) requirement that Commission approval be obtained prior to NITCO's constructing cable facilities for Northwest. *See Pipefitters Local Union 562 v. United States*, 407 U.S. 385, 432-35 (1972) (discussing 1 U.S.C. § 109). In fact, petitioners themselves contended before the FCC that the Cable Act did not apply to this case. *See* Pet. App. 12a, 42a n.8. *ACLU v. FCC*, 823 F.2d 1554, 1565-70 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988), on which petitioners rely (Pet. 18), did not address either whether the Cable Act applies to pre-Act events or whether the particular Cable Act provisions at issue here, which were not at issue in *ACLU*, are consistent with the FCC's rule.

With respect to the First Amendment argument, we note that, contrary to petitioners' evident assumption, the First Amendment confers no right to accept the advantages of a telephone monopoly and, at the same time, to exploit those advantages by entering the cable business in the same area. To the contrary, it is well-established that, notwithstanding the First Amendment, government may act to prevent threats to fair competition and thereby serve First Amendment values of increasing diversity. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945). In particular, it has been held that bars on cross-ownership—*e.g.*, control of a newspaper and a broadcast station in the same market—are a constitutional means of protecting the marketplace for speech. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

First, petitioners suggest that the lower court's reliance on various preclusion principles was improper because the FCC did not invoke those principles. Pet. 20 & n.29 (relying on *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)). But the *Chenery* principle applies only when a court is asked to exercise its judgment on a discretionary matter that is within the agency's authority and on which the agency has not exercised its discretion. *See ICC v. Brotherhood of Locomotive Eng'rs*, 107 S. Ct. 2360, 2368 (1987). Here, two of the three grounds relied on by the court below—the *Laffey* waiver doctrine and the law-of-the-case doctrine (Pet. App. 9a-10a, 12a-13a)—are concerned only with internal judicial processes and plainly do not involve any issue for agency discretion. Moreover, to the extent that the third ground—the exhaustion principle codified by 47 U.S.C. § 405—would allow an agency, in its discretion, to consider an entirely new issue on remand, the FCC in this case did exercise its discretion not to consider petitioners' arguments. Pet. App. 31a n.40 (consideration of petitioners' "new arguments at this late date . . . would not be in the public interest"); *see id.* at 11a. The court of appeals' ruling therefore is fully consistent with the *Chenery* principle.

Second, petitioners say that the court of appeals erred in applying the *Laffey* doctrine of preclusion—*i.e.*, that "where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." Pet. App. 9a (citing *Laffey v. Northwest Airlines*, 740 F.2d at 1089-90). Petitioners begin by claiming that *Laffey* is simply inapplicable here because "petitioners did raise the issues in the first appeal." Pet. 21 n.30. But the *Laffey* doctrine requires not just that the issues have been put forward in some fashion or other, but that they have been presented in accordance with governing rules and procedures. The rule is designed to protect orderly and efficient appellate procedures and to ensure that no litigant is specially

favored by being given a second chance to press an issue once forfeited because of the fortuity of a remand on an unrelated issue. Those policies apply equally whether the initial forfeiture was by a complete failure to raise an issue or by a failure to raise it in a proper manner. The court below thus acted well within the bounds of its discretion when it declined to disregard petitioners' "failure to properly present [their new] issues in the initial appeal." Pet. App. 10a (footnote omitted).[10]

Petitioners are also mistaken in arguing (Pet. 22-23) that the decision in *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967), excuses their failure to raise the constitutional arguments in accordance with governing rules. The Court in *Butts* did not announce a general exception to principles requiring arguments (First Amendment or otherwise) to be made in a timely fashion. The Court took the unusual step of allowing a defendant to raise its First Amendment defense to a libel action after judgment because the legal basis for the defense had been radically altered by the Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and the defendant had raised the defense in the trial court "immediately" after *Sullivan* "brought out the constitutional question." 388

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[10] Not only did petitioners fail to comply with applicable exhaustion requirements on their first appeal, they also failed to raise the constitutional arguments in their opening brief, leaving them to a supplemental brief filed one week before oral argument. It is well-established—based on Fed. R. App. P. 28's requirements that the opening brief state and argue the issues presented—that an issue not raised in the opening brief will generally not be considered on appeal. *See* 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* ¶ 228.02[2.-1], at 28-7 (2d ed. 1989) ("normally the court will not consider issues that are not . . . raised and argued [in the initial brief]"); 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, *Federal Practice & Procedure* § 3974, at 421 (1977) ("issues that are not raised in appellant's initial brief at this point will normally not be considered by the court").

U.S. at 143-45.[11] Here, there was neither a sudden change of relevant law nor unusually expedited efforts by petitioners. Numerous decisions had recognized the First Amendment implications of restrictions on cable television long before petitioners raised their First Amendment claims in March 1987, and even before the FCC's first decision in this matter. *See Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403 (9th Cir. March 1, 1985), *aff'd and remanded*, 476 U.S. 488 (1986) (recognizing First Amendment rights of cable television and citing cases from as early as 1977). And petitioners waited more than nine months following this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (June 2, 1986)—a decision that *narrowed* the prior decision of the Ninth Circuit rendered 15 months earlier—before raising their First Amendment claims.

Third, petitioners object to the court of appeals' application of exhaustion principles. Pet. 23-26.[12] But the

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[11] Even if *Butts* had announced an exception to traditional rules of waiver, that exception should not lightly be extended beyond the context of that case: the timely raising of objections in lower federal courts. A more stringent insistence on the proper raising of a claim is appropriate in a case, like the present, that involves a specific statutory exhaustion requirement based at least in part on the need for the judiciary to respect the decision-making processes of another branch of government. Certainly petitioners cite no cases applying the *Butts* standard in the agency exhaustion setting.

[12] Although the court of appeals did not apply either its exhaustion analysis or its law-of-the-case analysis to petitioners' facial constitutional attack on the Commission's rule, we think that it properly could have done so. The decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), cited by the court of appeals (Pet. App. 10a n.3), held only that the litigants were not required to exhaust a facial constitutional challenge to a *statute*, because, as the Court had made clear in *Johnson v. Robison*, 415 U.S. 361 (1974), the agency had no authority to declare a statute unconstitutional. 422 U.S. at 761-67. But agencies commonly are empowered—indeed,

court did not apply exhaustion doctrine "inflexibly or arbitrarily" (*id.* at 23), did not insist on more than "substantial compliance" with FCC rules (*id.* at 24 n.38), did not repudiate any of the grounds for excusing failure to exhaust recognized in the decisions cited by petitioners (*id.* at 23-24 & nn.36-38), and did not fail to examine whether the purposes of requiring exhaustion would be served in this case (*id.* at 25 & n.41). Rather, it simply concluded (Pet. App. 10a-11a) that applying the statutory exhaustion requirement would serve the requirement's "efficiency and fairness values" in this case (*id.* at 11a), agreeing with the Commission's own conclusion when it found that consideration of petitioners' new claims on remand would not be in the public interest (*id.* at 31a n.40). That conclusion is entirely correct, as there was no reason to excuse petitioners' failure properly to raise readily available First Amendment claims, and those claims call for inquiry into matters (such as the threat to competition posed by a telephone monopoly's entering the cable television business) on which the Commission should typically be allowed to express its views.[13]

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are generally obliged—to consider timely facial constitutional challenges to their own regulations in enforcement proceedings. *See Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). The initial panel appeared to recognize that fact in holding that petitioners were not entitled "to bypass statutory exhaustion requirements" by asserting their First Amendment claims (both facial and as applied) for the first time before the court. Pet. App. 42a n.8; *see* Supp. Br. of Pet'rs in No. 85-1542 (initial appeal, D.C. Cir.) at i ("THE FCC'S CROSS-OWNERSHIP RULES ARE UNCONSTITUTIONAL BOTH FACIALLY AND AS APPLIED TO NORTHWEST CABLE."). The second panel thus could rightly have concluded that petitioners had failed to exhaust their facial constitutional claim as well and that the first panel's decision to that effect was law of the case.

[13] The decisions petitioners principally rely on, apart from being D.C. Circuit decisions that could not create an intercircuit conflict, are fully consistent with that conclusion. For example, petitioners state that *Meredith Corp. v. FCC*, *supra*, conflicts with the present

Fourth, petitioners argue that the law-of-the-case doctrine does not support the court of appeals' refusal to consider their statutory and constitutional claims on the merits because the first panel did not address those claims on the merits. Pet. 26-28. That argument ignores what the first panel held. The panel decided that those claims were not properly before it because petitioners had failed to comply with the exhaustion requirement of 47 U.S.C. § 405. That ruling was the law of the case binding on the second panel, and as the second panel correctly concluded, it was dispositive of petitioners' claims. *See* note 12, *supra*.[14]

III. THE COURT OF APPEALS CORRECTLY DECIDED, AGREEING WITH PETITIONERS' POSITION, THAT THE CERTIFICATION REQUIREMENT OF 47 U.S.C. § 214(a) APPLIED IN THIS CASE.

Petitioners finally contend that the court of appeals erred in not deciding whether 47 U.S.C. § 214(a) applied to NITCO in this case. Pet. 28-30. This sort of error,

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ruling because it imposed an obligation on the FCC to consider the First Amendment argument. Pet. 25. As the court of appeals pointed out (Pet. App. 11a-12a), however, *Meredith* involved a properly presented First Amendment claim that the FCC "refused to consider . . . for a substantive reason" (809 F.2d at 869). Similarly, petitioners cite *Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95, 98-103 (D.C. Cir. 1985), in asserting that "the FCC routinely entertains new arguments in post-remand cases." Pet. 25 n.40. *Eastern Carolinas*, however, addressed only the FCC's consideration of new filings "concerning specifically remanded issues" (762 F.2d at 99) and expressly distinguished the question of raising new issues on remand (*id.* at 100 n.7).

[14] Petitioners also suggest that law-of-the-case principles are inapplicable here because *Preferred*, *Meredith*, and *ACLU* dramatically altered the law after the administrative record closed. Pet. 26 n.42. Even a casual reading of those decisions, however, reveals that they did not significantly alter the law in any way relevant to the present case. In any event, only decisions intervening between two judicial rulings could affect the law of the case, and *Preferred*, *Meredith*, and *ACLU* all were decided prior to the first panel's decision in this case.

even if it occurred, would not warrant review by this Court. But, in any event, the contention mischaracterizes the court's ruling. It is true that the first panel declined to decide whether Section 214(a) would apply to NITCO in the absence of a valid finding of affiliation between NITCO and Northwest (Pet. App. 42a-43a) and that the second panel did not address the issue. But both the first panel (*ibid.*) and second panel (*id.* at 4a, 7a n.2) pointed out that Section 214(a) did apply if NITCO and Northwest were affiliated within the meaning of the cross-ownership rule, and petitioners themselves agreed. *See* Pet. App. 42a-43a; Br. of Pet. in No. 85-1542 (initial appeal, D.C. Cir.) at 44 ("NITCO will agree that if it is affiliated with Northwest Cable, and therefore one and the same with the cable operator, then it would have violated Section 214(a)."") (footnote omitted).[15] The Commission's finding of affiliation on remand, affirmed by the court of appeals, necessarily disposed of petitioners' Section 214(a) objection.

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[15] The Commission has explained: "Because broadcast television signals do not recognize state boundaries, a cable television system transmitting such signals constitutes part of an interstate 'line' within the meaning of Section 214(a) of the Act when constructed by a telephone common carrier subject to our jurisdiction, such as NITCO." Pet. App. 63a n.23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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